

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

D. LEONARD AND SONS CONSTRUCTION,)	
)	PCHB NO. 92-168
Appellant,)	
)	
v.)	FINAL FINDINGS OF FACT,
)	CONCLUSIONS OF LAW
PUGET SOUND AIR POLLUTION CONTROL)	AND ORDER
AGENCY,)	
)	
Respondent.)	

This matter came on for hearing before the Pollution Control Hearings Board on Friday, December 11, 1992, in the Board's Offices in Lacey, Washington. In attendance were Board members Annette S. McGee, presiding, Harold S. Zimmerman, Chairman, and Robert V. Jensen with John H. Buckwalter, Administrative Appeals Judge participating. Proceedings were recorded by Lenore E. Elliott of Gene Barker & Associates, Inc., Olympia, Washington.

At issue was a civil penalty of \$2,000 imposed by the Puget Sound Air Pollution Control Agency (hereinafter "PSAPCA") jointly upon Appellant D. Leonard and Sons (hereinafter "Leonard"), and James Village Lynnwood, Inc. (hereinafter the "Village") which did not appeal and was not before the Board in this hearing.

Appearances were:

Dempsey Leonard, pro se, for Appellant.

Keith D. McGoffin, Attorney at Law, for Respondent

1 Witnesses were sworn and testified, exhibits were examined, and
2 arguments of the parties were considered. From these, the Board makes
3 these

4 FINDINGS OF FACT

5 I

6 The site of the incident which resulted in the imposition of the
7 civil penalty in question is at the intersection of 196th Street
8 Southwest and Highway 99, Lynnwood, Washington where demolition of an
9 old building and certain new construction were being performed for the
10 Village on property which it owned. Acting directly for the Village
11 was a general contractor, Abbott Construction, which in turn had
12 sub-contracted the demolition work to Leonard.

13 II

14 On June 3, 1992, a Leonard employee was operating a bucket loader
15 to load demolition debris into large dump trucks for removal. To
16 prevent undue emission of dust during this operation, Leonard was
17 wetting the debris down with water from a City source for which he had
18 received permission from Lynnwood City. However, at about 1:00 p.m.
19 Leonard was instructed by a City employee that he would have to use a
20 double check valve at the point of emission. He instructed his
21 employees to suspend further loading of debris and, instead, to gather
22 and load certain non-dust producing scrap items such as pipes until he
23 returned with the double check valve. He then left the site and was
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1 unable to find and purchase the proper valve and take it to the site
2 until the next morning.

3 III

4 On the same day, June 3, 1992, at about 3:56 p.m., Rick D. Hess,
5 an Air Pollution Control Inspector for PSAPCA, was driving through the
6 site intersection and observed a gray/white plume of dust being
7 generated by the Leonard bucket loader loading debris into a dump
8 truck. The plume was traveling in a westerly direction into the
9 parking lot of two stores, Ernst and Albertsons, reaching a height of
10 approximately 80 feet and a length of approximately 200 feet.
11 Particles of material were falling out of the stream, some of which
12 were deposited on the inspector's Agency vehicle. The inspector
13 estimated the emission to range from 60% to 90% opacity at the point
14 of generation. He also observed that there were no dust control
15 measures being employed and that there were a number of people and
16 vehicles in the parking area.

17 IV

18 At 4:19 p.m. the inspector made contact with a Leonard employee,
19 Gary Stoops, who was the operator of the bucket loader. The inspector
20 discussed the dust emissions with Stoops and asked if water was being
21 used to control the dust. Stoops replied that no water was being
22 applied because of a breakage in the water main which was supplying
23 the work site. The inspector informed Stoops that the dust emission
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1 constituted a violation of PSAPCA regulations.

2 V

3 The inspector then explained the nature of the violation to
4 another Leonard employee who identified himself as Mr. Leonard's
5 nephew but would not give his name. The inspector then prepared a
6 Notice of Violation No. 28700 which he, after again discussing the
7 nature of the violation, presented to another Leonard employee who
8 identified himself as the project foreman but refused to give his name
9 or to sign the NOV. When the foreman said that he wanted to finish
10 the job by loading two more trucks, the inspector's response was
11 negative. Because the foreman had refused to sign the NOV, the
12 inspector prepared and signed a Return of Service the next day, June
13 4, 1992.

14 VI

15 Because the Village owned the property and had contracted out the
16 work being performed, the inspector contacted Burt Antill, the
17 Property Manager for the Village, on June 5, 1992 and again explained
18 the nature of the violation. The inspector then issued a new Notice
19 of Violation, No. 28232, citing both Leonard and the Village for
20 violation of PSAPCA Regulation I, Sections 9.15 (a) and (d) in that
21 they

22 *Caused or allowed the emission of fugitive dust without using*
23 *best available control technology to control the emissions and*
24 *caused or allowed the emission of fugitive dust in sufficient*
25 *quantities and of such characteristics which unreasonably*
26 *interferes with enjoyment of life and property at 196 St. SW and*
27 *Hwy. 99.*

1 He served the Notice on both parties by certified mail dated
2 August 13, 1992.

3 VII

4 On August 13, 1992, PSAPCA issued a Notice and Order of Civil
5 Penalty assessing a civil penalty of \$2,000 jointly on Leonard and the
6 Village for violating PSAPCA Regulation I, Section (a):

7 *It shall be unlawful for any person to cause or allow the*
8 *emission of fugitive dust unless such person uses the best*
available control technology to control the emissions.

9 and Section (d):

10 *It shall be unlawful for any person to cause or allow the*
11 *emission of fugitive dust in sufficient quantities and of such*
12 *characteristics and duration as is, or is likely to be, injurious*
to human health, plant or animal life, or property, or which
unreasonably interferes with enjoyment of life and property.

13 VIII

14 A timely appeal was filed with this board by Leonard; the Village
15 did not appeal. Any Conclusion of Law deemed to be a Finding of Fact
16 is hereby adopted as such. From these Findings of Fact the Board
17 makes these

18 CONCLUSIONS OF LAW

19 I

20 This Board has jurisdiction over the parties and the subject
21 matter of this action. RCW's 43.21B.110/310. Because this is an
22 appeal of a civil penalty, Respondent PSAPCA has the burden of proof.
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1 II

2 Leonard does not contest that the alleged violations took place.
3 He appeals only the imposition of the \$2,000 penalty on him, claiming
4 that he acted in good faith by instructing his employees to cease
5 debris loading operations until he returned with the required double
6 check valve and that his employees, in his absence, did not follow his
7 instructions.

8 III

9 This Board has consistently stated, as in Pearson Construction v.
10 PSAPCA, PCHB NO. 88-186 (1989), that

11 *The Washington Clean Air Act is a strict liability statute.*
12 *Acts violating its implementing regulations are not excused on*
the basis of intent.

13 Accordingly, we cannot excuse Leonard because he intended,
14 through his directions to his employees, that the debris loading
15 operations should be suspended until his return with the required
16 valve. The fact is that the emission of the fugitive dust was caused
17 by the actions of his employees for whom he is responsible either with
18 or without his presence at the time of the violation.

19 IV

20 The only reason we might find for mitigation of the \$2,000
21 penalty would be if the violation were not serious enough to warrant
22 the size of the penalty. We cannot reach such a conclusion. The size
23 of the dust cloud, its drifting over the parking lot with numerous
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1 people and cars present, its settling on and in the PSAPCA Inspector's
2 car are sufficient to warrant the \$2,000 penalty. (We note that the
3 Inspector's testimony that there were three teenage boys present who
4 stated that they were affected by the dust was hearsay and plays no
5 part in the Board's decision.) We conclude that we will not mitigate
6 the \$2,000 penalty.

7 V

8 However, the Board has consistently found that the
9 responsibilities and liabilities inherent in the Clean Air Act cannot
10 be contracted away. Pearson, supra. Because the Village is the
11 property owner for whom the work was being done, its joint
12 responsibility cannot be passed on to Leonard. Therefore we conclude
13 that Leonard shall be liable for only half of the total penalty.
14 Since the Village did not appeal and is not before us, we have no
15 jurisdiction to order the Village to pay the other half. If PSAPCA
16 wishes to pursue collection of the the Village's half, it will have to
17 do so through whatever other recourse it may have.

18 VI

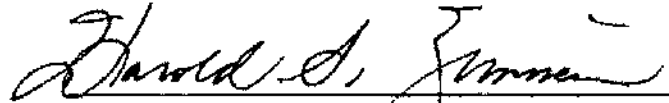
19 Any Finding of Fact deemed to be a Conclusion of Law is hereby
20 adopted as such. From the Conclusions of Law, the Board enters this
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ORDER

THAT the total civil penalty of \$2,000 is AFFIRMED, but that Leonard is liable for only \$1,000 of the total, \$500 of which is payable to PSAPCA upon receipt of this Order with \$500 suspended on the condition that Appellant Leonard shall have no further dust emission violations of PSAPCA Regulation 1 for two years following the date of issuance of this Order.

DONE this 24th day of December, 1992.

POLLUTION CONTROL HEARINGS BOARD




HAROLD S. ZIMMERMAN Chairman


ANNETTE S. MCGEE, Member

(See Dissenting Opinion)

ROBERT V. JENSEN, Attorney Member


JOHN H. BUCKWALTER
Administrative Appeals Judge

DISSENTING OPINION

I, Robert V. Jensen, attorney member of the Board, concur with the foregoing opinion. However, I disagree with that portion of the Order which suspends one-half of the \$1000 penalty assessed against D. Leonard and Sons Construction. The Board's decision is devoid of any basis for this suspension. Mr. Leonard testified that he has been in the construction for 17 years. He is familiar with the requirement to water-down construction debris that contains asbestos. In addition, he admitted that he had received one other asbestos civil penalty, in his experience as a contractor. I would affirm a \$1000 penalty against the appellant.


ROBERT V. JENSEN, Attorney Member